IP 05-0242-M 1 F US v Butron
Magistrate Kennard P. Foster Signed on 6/28/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	CAUSE NO. IP 05-0242M-01
ANDRES C. BUTRON	)	
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
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UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	CAUSE NO. IP 05-0242M-01
ANDRES C. BUTRON	)	
	)	
Defendant.	)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

The defendant is charged in a criminal complaint issued on June 17, 2005 with one count of conspiracy to possess with intent to distribute 5 kilogram or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846. The government moved for detention pursuant to 18 U.S.C. §§ 3142(e), (f)(1)(A), (f)(1)(C), and (f)(2)(A) on the grounds that the defendant is charged with a drug trafficking offense with the maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act, and the defendant is a danger to the community and serious risk of flight, if released. The detention hearing was held on June 24, 2005, on the defendant's first appearance on the criminal complaint in the Southern District of Indiana. The United States appeared by John E. Dowd, Assistant United States Attorney. Mr. Butron appeared in person and by his retained counsel, Joseph M. Cleary.

The government rested on the complaint, affidavit and testimony of United States Drug Enforcement Special Agent Gerald C. Dooley, and defense counsel cross examined Special Agent Dooley on all issues before the court. After a hearing, the court found probable cause as to the charges in the complaint, and Mr. Butron was held to answer in the district court. The finding of probable cause as to the charges in the complaint gave rise to the presumptions that there is no condition or combination of conditions of release which will reasonably assure the safety of the community or that the defendant will not be serious risks to flee if released.

Mr. Butron presented any evidence on the issue of detention. The court admitted the Pretrial Services Reports (PS3) from the Northern District of Illinois (Chicago Division), the complaint and affidavit and the testimony of Special Agent Dooley on the issue of detention. The evidence presented did not rebut the presumptions that the defendant are serious risks of flight, or rebut the presumption found in 18 U.S.C. § 3142(e) that the defendant is a danger to the community. Furthermore, the totality of the evidence presented demonstrates clearly and convincingly that there is no condition or a combination of conditions of release which will reasonably assure the safety of the community, and that by a preponderance of the evidence that the defendant will be a serious risk of flight if released. Consequently, the defendant was ordered detained.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The defendant is charged in a criminal complaint issued on June 17, 2005 with one count of conspiracy to possess with intent to distribute 5 kilogram or more of a mixture or substance containing a detectable amount of cocaine, a Schedule II Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

2. Based on the amount of cocaine alleged in the complaint, the penalty for conspiracy to possess with the intent to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 846, 841(b), is a mandatory minimum sentence of 10 years and a maximum of life imprisonment.

3. The Court takes judicial notice of the complaint in this cause. The Court further incorporates the evidence admitted during the detention hearing, as if set forth here.

4. The government submitted the matter on the criminal complaint and the testimony of Special Agent Dooley. Counsel for the defendant examined Special Agent Dooley on all issues before the court. Special Agent Dooley testified that the conspiracy involved in excess of fifteen kilograms of cocaine, and was ongoing at the time of the arrest of Mr. Butron. According to the PS3, Mr. Butron spent the first sixteen years of his life in Mexico and traveled to the Republic of Mexico four times during the last year, including in February 2005 (which was during the course of the conspiracy charged in the criminal complaint). Mr. Butron's employment history and residential locations are murky at best.

5. The Court finds that the complaint established probable cause for the offense charged, and the rebuttable presumption arises that the defendant is a serious risk of flight and danger to the community. 18 U.S.C. § 3142(e).

6. In the first instance, the evidence at the detention hearing does not rebut the presumptions found in 18 U.S.C. § 3142(e) that the defendant is a serious risk of flight and a danger to the community. Furthermore, the totality of the evidence presented demonstrates clearly and convincingly that there is no condition or a combination of conditions of release which will reasonably assure the safety of the community, and that by a preponderance of the

evidence that the defendant will be a serious risk of flight if released. Therefore, Andres Butron is ORDERED DETAINED.

7. When a motion for pretrial detention is made, the Court engages a two-step analysis: first, the judicial officer determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *United States v. Friedman*, 837 F.2d 48, 49 (2nd Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving (1) a crime of violence, (2) an offense with a maximum punishment of life imprisonment or death, (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more, or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses, 18 U.S.C. § 3142(f)(1), or, upon motion by the United States or the Court *sua sponte*, in cases involving (5) a serious risk that the person will flee, or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *Id.*, § 3142(f)(2); *United States v. Sloan*, 820 F.Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. 18 U.S.C. § 3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. *See United States v. DeBeir*, 16 F.Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F.Supp. 260, 265 (W.D. N.Y. 1998) (same).

In this case, the United States moves for detention pursuant to § 3142(f)(1)(B) (C), and (f)(2)(A) and the Court has found these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions of § 3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. 18 U.S.C. § 3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3rd Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2nd Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F.Supp. 591, 596 (N.D. Ind. 1987). With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S.Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F.Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S.Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is "reasonable assurance"; a court may not order pretrial detention because there is no condition or combination

of conditions which would *guarantee* the defendant's appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

8. A rebuttable presumption that no condition or combination of conditions will reasonably assure the defendant's appearance or the safety of any other person and the community arises when the judicial officer finds that there is probable cause to believe that the defendant committed an offense under (1) the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*; the Controlled Substances Import and Export Act, 21 U.S.C. § 951 *et seq.*, or the Maritime Drug Law Enforcement Act, 46 U.S.C. App. § 1901 *et seq.*, for which a maximum term of imprisonment of ten years is prescribed; (2) 18 U.S.C. § 924(c); (3) 18 U.S.C. § 956(a); or (4) 18 U.S.C. § 2332b. 18 U.S.C. § 3142(e).

This presumption creates a burden of production upon a defendant, not a burden of persuasion: the defendant must produce a basis for believing that he will appear as required and will not pose a danger to the community. Although most rebuttable presumptions disappear when any evidence is presented in opposition, a § 3142(e) presumption is not such a "bursting bubble". *Portes*, 786 F.2d at 765; *United States v. Jessup*, 757 F.2d 378, 383 (1st Cir. 1985). Therefore, when a defendant has rebutted a presumption by producing some evidence contrary to it, a judge should still give weight to Congress' finding and direction that repeat offenders involved in crimes of violence or drug trafficking, as a general rule, pose special risks of flight and dangers to the community. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (presumption of dangerousness); *United States v. Diaz*, 777 F.2d 1236, 1238 (7th Cir. 1985); *Jessup*, 757 F.2d at 383.

The Court has found the presumptions arise in this case. The defendant did not present any evidence at the detention hearing other than by way of an oral proffer, and the evidence in

the PS3's did not rebut the presumptions that the defendant is a serious risk of flight and a danger to the community.

9. Assuming *arguendo* the defendant had rebutted both of the presumptions, he would still be detained. The Court considers the evidence presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both on the issue of flight and dangerousness to the community are the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir. 1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

10. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

a. This case charges the defendant based on an incipient conspiracy involving at more than 15 kilograms of cocaine, a narcotic drug. As well as cocaine, firearms were recovered during the course of the investigation. The presence of firearms along with this quantity of a narcotic drug increases the danger to the community.

b. The evidence admitted during the probable cause hearing demonstrates a strong probability of conviction.

c. The possible mandatory minimum sentence of ten years and maximum of life for the drug charge, when coupled with the fact that Mr. Butron speaks fluent Spanish and

makes multiple trips per year to Mexico substantially increases the seriousness of his risk of flight.

d. The defendant' involvement with this quantity of cocaine reflects he is a danger to the community.

e. The Court having weighed the evidence regarding the factors found in 18 U.S.C. § 3142(g), and based upon the totality of evidence set forth above, concludes that defendant has not rebutted the presumptions in favor of detention, and should be detained. Furthermore, he is, by the preponderance of the evidence, a serious risk of flight and clearly and convincingly a danger to the community.

WHEREFORE, Andres Butron is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. He shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in

charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

Dated this _____ day of June, 2005.

Kennard P. Foster, Magistrate Judge
United States District Court

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